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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1968

No.

CONTINENTAL NUT COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

Continental Nut Company prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on May 22, 1968.

OPINIONS BELOW

The opinion of the Court of Appeals is officially reported at 395 F.2d 830 and appears herein as Ap-

pendix A, at p. i. The Decision and Order of the National Labor Relations Board in this case (which was enforced by the Court of Appeals) is officially reported at 164 NLRB No. 72 and appears herein as Appendix B, at p. ix.

JURISDICTION

The judgment of the Court of Appeals was entered on May 22, 1968 (Appendix A, p. i). Rehearing was denied on July 8, 1968. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1) and Section 10(e) of the National Labor Relations Act, as amended, 29 U.S.C., Section 160(e).

QUESTION PRESENTED

Whether the court below applied an erroneous standard of review which is inconsistent with the proper standard of reviewing in election determination cases under the National Labor Relations Act.

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Section 151, et seq.), the Statements of Procedure of the National Labor Relations Board—Series 8, as amended (29 C.F.R. Section 101.1, et seq.), and the Rules and Regulations of the National Labor Relations Board—Series 8, as amended (29 C.F.R.

Section 102.1, et seq.) are set forth in Appendix C, at p. xxii.

STATEMENT

This case arises from a representation proceeding under the National Labor Relations Act.

On August 17, 1966, the Union[1] filed a petition with the Board seeking an election among Petitioner's employees. On September 6, 1966, Petitioner and the Union executed an Agreement for Consent Election. An election was held on September 12, 1966, which resulted in a majority vote for the Union. Thereafter, Petitioner filed timely objections to the election alleging that the Union had made certain promises of benefit to the employees. On December 1, 1966, the Regional Director issued a Report on Objections and Certification of Representative. The Regional Director found that the Union had in fact made promises of benefit to the employees to the effect that the initiation fee would probably be reduced if the Union won the election. The Regional Director overruled Petitioner's objections, however, citing the Board's *per se* rule that, as a matter of law, a promise by a Union to reduce or waive initiation fees if the election is won does not impair the employees' freedom of choice.[2]

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[1]Warehousemen's Union Local 17, International Longshormen and Warehousemen's Union.

[2]The Regional Director cited the Board's decision in *Weyerhaeuser Company*, 146 NLRB 1. In that decision the Board expressly relied on its earlier decision in *Gilmore Industries, Inc.*, 142 NLRB 781. The *Gilmore* case, however, has been overruled by the Sixth Circuit. *National Labor Relations Board v. Gilmore In-*

The Regional Director then certified the Union as the exclusive representative of the employees.

Petitioner refused to bargain with the Union in order to obtain judicial review of the Board's *per se* rule.[3] This resulted in the filing of the unfair labor practice charge which underlies this case. Upon the General Counsel's motion for summary judgment, the Board issued its decision and order on May 10, 1967, finding that Petitioner had unlawfully refused to bargain.

Thereafter, the Board petitioned the United States Court of Appeals for the Ninth Circuit for enforcement of its order.

Petitioner urged the court to overrule the Board's *per se* rule as the Sixth Circuit had done in the *Gilmore* case.[4]

The court below, however, upheld the Board's order without reaching the merits of Petitioner's objections on the ground that under the Agreement for Consent Election the determinations of the Regional Director are binding upon the Courts of Appeals unless they are arbitrary and capricious. The specific language relied on by the court below is contained in paragraphs

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dustries, Inc., 341 F. 2d 240 (C.A. 6); c.f. *Truck Drivers and Helpers Local Union 568 v. National Labor Relations Board*, 379 F. 2d 137, 145 (C.A.D.C.).

[3]Representation cases are not directly reviewable under the National Labor Relations Act. However, they are subject to judicial review when a related unfair labor practice proceeding is before the court. See Section 9(d) of the Act which specifically provides that the record in representation proceedings is to be included in the record filed with the Courts of Appeals under Sections 10(e) or 10(f).

[4]See *supra* n. 2

1 and 6 of the Agreement for Consent Election and is as follows:

> "1. Secret Ballot. . . . The determination of the Regional Director shall be *final and binding* upon any question including questions as to the eligibility of voters, raised by any party hereto relating in any manner to the election . . .
>
> "6. Objections, challenges, reports thereon. . . . The method of investigation of objections and challenges, including the question whether a hearing should be held in connection therewith, shall be determined by the Regional Director, whose decision shall be *final and binding.*" (Emphasis supplied.)

REASONS FOR GRANTING THE WRIT

The court below, in enforcing the Board's decision that Petitioner had unlawfully refused to bargain, applied an erroneous standard of review which has, in effect, deprived Petitioner of its statutory right to review as set out in Section 10(e) of the National Labor Relations Act. Because of the importance of this issue to the proper administration of the Act, we submit that Supreme Court review is warranted.[5]

1. Section 10(e) of the Act, which provides for judicial review of Board orders, specifically provides that the substantial evidence rule is the stand-

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[5]The Board conducted 8,324 representation elections during the past fiscal year, and objections to the elections were filed in 1,471 of these cases. Thirty-first Annual Report of the NLRB, p. 203 (G.P.O., 1967). Many of these election cases are reviewed in the Courts of Appeals each year.

ard of review to be applied by the Courts of Appeals. *Universal Camera Corp. v. National Labor Relations Board,* 340 U.S. 474. The substantial evidence rule applies in all cases, including election determinations. *Celanese Corp. v. National Labor Relations Board,* 291 F.2d 224, 225 (C.A. 7), cert. denied 369 U.S. 925; *National Labor Relations Board v. Bata Shoe Co.,* 377 F.2d 821, 827 (C.A. 4), cert. denied 389 U.S. 917. The court in the instant case, however, failed to apply the substantial evidence rule. Instead, it refused even to consider the merits of the case, holding that the appropriate standard of review was whether the determination was "arbitrary and capricious".[6]

2. Contrary to the decision of the court below, there is no legitimate basis for limiting the scope of judicial review because the parties entered into a consent election agreement which made the determination of the Board's Regional Director "final and binding". This agreement limits review only within the administrative process and is not designed to limit judicial review.

The Board, by its Rules and Regulations and Statements of Procedure has provided for two methods of consent election.[7] Section 102.62(a) of the Rules and Regulations provides for a consent election agreement

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[6]The court below incorrectly stated that Petitioner did not assert that the Regional Director was arbitrary or capricious or that his determination was not in conformity with the Board policies or provisions of the Act. See Petitioner's Petition for Rehearing which is part of the record of this case.

[7]Although Section 9(c)(1) of the Act provides for a hearing before an election, a later subsection of Section 9(c), subsection (4), provides that such hearings may be waived by stipulation for the purpose of a consent election.

leading to a determination by the Regional Director of the facts ascertained after such consent election and Section 102.62(b) provides for a consent election agreement leading to a determination by the Board of the facts ascertained after such consent election. Pursuant to this regulation, the Board has adopted two standard forms which are reproduced in Appendix D. There is the Agreement for Consent Election, hereafter called "Agreement", with the final determination by the Regional Director, and, the Stipulation for Certification upon Consent Election, hereafter called "Stipulation", with the final determination being made by the Board.

It should be obvious that any interpretation of the language of either the Agreement form or the Stipulation form must be consistent with the Rules and Regulations and Statements of Procedure from which the forms are derived. Yet, as we now show, the interpretation of the Court below lacks such consistency.

In Section 101.19 of the Statements of Procedure, the Board, after describing the Agreement method in subsection (a), summarizes the difference between the Agreement and the Stipulation in subsection (b):

> "Thus, it is provided that the *Board, rather than the Regional Director, makes the final determination* of questions raised concerning eligibility, challenged votes, and objections to the conduct of the election." (Emphasis supplied.)

In this context, we submit that the language "final and binding" in the Agreement form refers to the fact that there is no appeal to the Board with regard to the Regional Director's determinations and that they

are final in the same sense as the determinations of the Board under the Stipulation method are considered final.[8]

Under this interpretation it would follow that upon Court review, there would be no distinction between the "final" determination of the Regional Director under the Agreement method and the "final" determination of the Board under the Stipulation method. In this regard Section 102.62(a) of the Board's Rules and Regulations is clearly in point.

> ". . . The ruling and determinations by the Regional Director of the results shall be final, and the Regional Director shall issue to the parties a certification of the results of the election, including certification of representatives where appropriate, *with the same force and effect as if issued by the Board. . . .*" (Emphasis supplied.)

If the certification under the Agreement form is to have the "same force and effect" as a certification issued by the Board under the Stipulation form, then it is error to sharply restrict the scope of review of one of the certifications as the Court below did here.[9]

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[8]As mentioned *supra* n. 3, representation cases are not directly reviewable and it is in this sense that a certification is considered final whether issued by the Regional Director pursuant to the Agreement or by the Board pursuant to the Stipulation.

[9]This is not to say that parties to an election could not expressly waive their right to judicial review. The Board has not presented the parties with a true waiver, however. What the Board has done is to set up two different procedures for conducting consent elections and then conditioning the use of one of them on a severe restriction on the scope of judicial review. Petitioner signed the Agreement form in order to have the Regional Director, rather than the Board, make the final *administrative* determination and not to waive judicial review of that administrative determination. For the Board to say that you can't have the Regional Director

3. By refusing properly to review the merits of the instant case under the substantial evidence rule, the court below has prevented Petitioner from obtaining review of an important issue of labor law on which the Courts of Appeals have applied inconsistent approaches. Compare *National Labor Relations Board v. Gilmore Industries, Inc.*, 341 F.2d 240 (C.A. 6) with *National Labor Relations Board v. Gorbea, Perez & Morell*, 328 F.2d 679, 682 (C.A. 1). Moreover, the court has adhered to an erroneous review policy which could deny proper review in a substantial number of election cases under the administration of the National Labor Relations Act.

This court has quite properly placed great importance on the availability of judicial review of orders of administrative agencies. Thus, in *Abbott Laboratories v. Gardner*, 387 U. S. 136, 140, the Court stated that:

> ". . . judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress."

The question of how the Agreement form should be interpreted has been placed before this Court on one occasion, but the Court specifically refused to decide the issue at that time and instead decided the case on the merits of the underlying issue. *National Labor Relations Board v. A. J. Tower Company*, 329

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make the final determination unless you also agree to give up your right to judicial review is to seriously undermine the statutory right to such review. Cf. *United States v. Jackson*, 20 L.Ed. 2d 138. This Court should not allow such an important right to be derogated in such a flagrant manner.

U.S. 324, 335 (1946). Since that time the Courts of Appeals have uniformly accepted the Board's interpretation of the Agreement form, an interpretation which is contrary to the Board's own Rules and Regulations and Statements of Procedure.[10]

Therefore, if this valuable and substantial statutory right is to be protected, it must be done by this Court. Review is therefore warranted.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a Writ of Certiorari should be granted.

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[10] *Manning, Maxwell & Moore, Inc. v. National Labor Relations Board*, 324 F. 2d 857, 858 (CA 5); *National Labor Relations Board v. Parkhurst Manufacturing Co.*, 317 F. 2d 513, 516 (C.A. 8); *National Labor Relations Board v. J. W. Rex Co.*, 243 F. 2d 356, 358 (C.A. 3); *Elm City Broadcasting v. National Labor Relations Board*, 228 F. 2d 483, 485, 486 (C.A. 2); *National Labor Relations Board v. Voleny Felt Mills*, 210 F. 2d 559, 560 (C.A. 6); *National Labor Relations Board v. Saxe-Glassman Shoe Corp.*, 201 F. 2d 238, 240 (C.A. 1).

(Appendices Follow)